

OCT 20 2015

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

In re:) Case No. 14-21394-B-13
)
 PATRICK CLARK and SUZANNE CLARK,) DC No. PP-2
)
)
 Debtor(s).)

NOT FOR PUBLICATION

**MEMORANDUM DECISION AND ORDER (1) GRANTING CLARIFICATION
 MOTION AND AMENDING ORDER OF SEPTEMBER 11, 2015, TO GRANT MOTION
 TO APPROVE VALUATION AND TRANSFER OF STOCK PURSUANT TO CONFIRMED
 CHAPTER 13 PLAN AND (2) DENYING EXTENSION MOTION AS MOOT**

INTRODUCTION

This memorandum decision addresses two motions filed by S&J
 Advertising, Inc., pending before the court:

(1) a *Motion to Clarify Procedures Governing Motion to
 Approve Valuation and Transfer of Stock Pursuant to
 Confirmed Chapter 13 Plan; Alternatively Motion to
 Enlarge Time for Removal; Request for Determination
 That Proceeding is Non-Core* filed on September 16,
 2015; and

(2) a *Motion to Extend Time for Appeal of Order Denying
 Motion to Approve Valuation and Transfer of Stock
 Pursuant to Confirmed Chapter 13 Plan* filed on
 September 23, 2015.

The court is also aware of a notice of appeal filed on
 September 23, 2015, by debtors Suzanne and Patrick Clark.¹

Each of these matters relate to oral rulings the court
 placed on the record in open court on September 9, 2015, and the

¹To avoid confusion, "co-debtor" will refer to Suzanne Clark
 and "debtors" will refer to Patrick and Suzanne Clark.

1 corresponding order entered on September 11, 2015, that
2 incorporates the oral rulings. Both the oral rulings and order
3 grant in part and deny in part the corporation's *Motion to*
4 *Approve Valuation and Transfer of Stock Pursuant to Confirmed*
5 *Chapter 13 Plan* filed on June 10, 2015.²

6 The court has reviewed the clarification motion and its
7 supplement, the debtor's opposition to the clarification motion,
8 the corporation's reply, and all related supporting exhibits and
9 declarations. The court also heard and has considered the
10 argument of counsel stated on the record in open court on October
11 14, 2015. Appearances were noted on the record of that hearing.
12 This memorandum decision disposes of both the extension and the
13 clarification motions. It also amends the court's earlier
14 decision on the valuation and transfer motion.

15 Because the clarification motion was filed five days after
16 the order on the valuation and transfer motion was entered, the
17 court will treat the clarification motion as a motion under
18 Federal Rule of Civil Procedure 52(b) applicable by Federal Rule
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20 ²Generally, in granting that motion in part and denying it in
21 part the court (i) held that the co-debtor's corporate shares
22 could (and would) be sold under 11 U.S.C. § 363 without regard to
23 California Corporations Code § 2000, (ii) declined to reach the
24 debtors' constitutional objections to CCC § 2000 because the
25 valuation and transfer motion could be resolved under the
26 Bankruptcy Code, (iii) found that the debtors are precluded by
27 judicial estoppel from claiming the \$247,000 appraised "fair
28 value" of the co-debtor's 50% interest in the corporation agreed
to by jointly-appointed appraisers is too low, (iv) denied the
debtors' request to conduct discovery related to the appraisal,
and (v) set an evidentiary hearing to confirm the joint
appraisers' valuation. The court reserved for determination at
or after the evidentiary hearing other objections by the debtors
to the joint-appraisal report.

1 of Bankruptcy Procedure 7052 and/or a motion under Federal Rule
2 of Civil Procedure 59(e) applicable by Federal Rule Bankruptcy
3 Procedure 9023. That renders the corporation's request for an
4 extension of time to appeal from the decision on the valuation
5 and transfer motion to October 28, 2015, moot because the
6 corporation will now have fourteen days after this decision is
7 entered to appeal from the valuation and transfer motion and/or
8 this decision if it elects to do so. See Fed. R. Bankr. P.
9 8002(b)(1)(A)-(B). Because the clarification motion was filed
10 seven days before the debtors' notice of appeal, that also means
11 the notice of appeal (assuming the appeal is not from an
12 interlocutory order) becomes effective upon entry of this
13 decision. See Fed. R. Bankr. P. 8002(b)(2).

14 The clarification motion asks the court to clarify whether
15 or not CCC § 2000 governs the corporation's valuation and
16 transfer motion or, in other words, whether CCC § 2000 governs
17 the sale of the co-debtor's 50% interest in the corporation
18 required by the Debtors' Third Modified Chapter 13 Plan. The
19 court previously concluded that CCC § 2000 did not govern the
20 valuation and transfer motion and that the co-debtor's 50%
21 interest in the corporation could (and would) be sold under
22 § 363. The court clarifies and amends that decision.

23 Upon further consideration, the court now concludes that CCC
24 § 2000 governs the valuation and transfer motion and the sale of
25 the co-debtor's 50% interest in the corporation required by the
26 third modified plan. The clarification motion also asks the
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1 court to extend the now-passed deadline to remove the CCC § 2000
2 proceeding pending in Solano County Superior Court. Based on
3 this amended decision, the corporation's request for an extension
4 of the removal deadline will be denied as moot. And the
5 clarification motion asks the court to determine if the valuation
6 and transfer motion is a core or non-core proceeding. That
7 determination is provided below.

8
9 **BACKGROUND**

10 The debtors filed their chapter 13 petition on February 4,
11 2014. The co-debtor owned a 50% interest in the corporation when
12 the petition was filed.

13 On June 4, 2014, the co-debtor elected to voluntarily
14 dissolve the corporation. That election is irrevocable under CCC
15 § 1902.

16 On August 11, 2014, the corporation filed a petition in
17 state court to stay the irrevocable dissolution process and to
18 ascertain the value of the co-debtor's corporate interest under
19 CCC § 2000. The state court granted the corporation's petition
20 on December 12, 2014.

21 On January 27, 2015, the corporation moved for relief from
22 the automatic stay of 11 U.S.C. § 362(a) to continue the CCC
23 § 2000 process pending in state court. This court granted that
24 motion in part and denied it in part in an order entered on March
25 4, 2015. Since the state court had already appointed the
26 parties' jointly-selected appraisers, this court concluded it was
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1 more economical and a better use of resources to allow the joint
2 appraisers to complete their work and value the co-debtor's 50%
3 interest in the corporation. This court also ordered that "[a]ll
4 further proceedings relating to the continuation and completion
5 of Corporations Code § 2000 process to value and purchase the
6 debtor's shareholder interest shall be brought before this
7 court."

8 On March 10, 2015, six days after the stay relief order was
9 entered, the debtors filed their third modified plan and a motion
10 to confirm it. The third modified plan includes an "additional
11 provision" that requires the debtors to contribute no less than
12 \$160,000 from the sale of the co-debtor's 50% interest in the
13 corporation to fund the plan. The third modified plan also
14 states that upon confirmation all property of the estate shall
15 revert in the debtors. The motion to confirm the third modified
16 plan was granted in a minute order entered on May 18, 2015. The
17 confirmation order was entered the following day on May 19, 2015.

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19 **DISCUSSION**

20 Federal Rule of Civil Procedure 52(b), incorporated by
21 Federal Rule of Bankruptcy Procedure 7052, allows the court to
22 amend its findings or make additional findings and amend its
23 judgment accordingly. A motion under Rules 52(b)/7052 may also
24 be joined with a motion under Federal Rule of Civil Procedure
25 59(e), as incorporated by Federal Rule of Bankruptcy Procedure
26 9023.

Rules 59(e)/9023 allow the court to alter or amend a judgment. In a recent opinion, Tattersalls, Ltd. v. DeHaven, 745 F.3d 1294 (9th Cir. 2014), the Ninth Circuit explained that if a court makes a substantive change in its decision, the judgment must be amended under Rule 59(e). Id. at 1299. Amending a judgment under Rule 59(e)/9023 after its entry is "an extraordinary remedy which should be used sparingly." Allstate Ins. Co. v. Herron, 634 F.3d 1101, 1111 (9th Cir. 2011). A Rule 59(e)/9023 motion may not be used to raise arguments or present evidence for the first time that could have been raised or presented earlier in the litigation. Kona Enter., Inc. v. Estate of Bishop, 229 F.3d 877, 890 (9th Cir. 2000) (citation omitted). However, such a motion may be granted on one of four grounds:

- (1) if such motion is necessary to correct manifest errors of law or fact upon which the judgment rests;
- (2) if such motion is necessary to present newly discovered or previously unavailable evidence; (3) if such motion is necessary to prevent manifest injustice; or (4) if the amendment is justified by an intervening change in controlling law.

Allstate, 634 F.3d at 1111.

The remedy afforded under Rules 59(e)/9023 is appropriate in this case for two reasons: (1) to correct manifest errors of law and fact; and (2) to prevent manifest injustice.

A. The Court Previously Did Not Fully Consider the Effect of the Revesting Provision in the Debtors' Confirmed Third Modified Plan.

The court previously concluded that the co-debtor's 50% interest in the corporation could be sold under § 363 without

1 regard to CCC § 2000 because that interest was property of the
2 estate over which the court had exclusive jurisdiction. While
3 that may have been a correct assessment before the third modified
4 plan was confirmed on May 19, 2015, the court now recognizes that
5 under 11 U.S.C. § 1327(b) that was not a correct assessment when
6 the valuation and transfer motion was filed on June 10, 2015, and
7 heard on September 9, 2015.³ Upon confirmation of the third
8 modified plan, § 1327(b) operated to revest the co-debtor's
9 corporate interest in the co-debtor. Revesting fundamentally
10 transformed the nature of the co-debtor's 50% interest from
11 property of the estate to property of the debtor. That
12 transformation is not insignificant.

13 The court has reviewed and considered Cal. Franchise Tax Bd.
14 v. Kendall (In re Jones), 657 F.3d 921 (9th Cir. 2011), which it
15 previously overlooked and neither party cited. The issue decided
16 by the Ninth Circuit in Jones was whether a taxing authority had
17 violated § 362(a) in seeking to collect delinquent, post-petition
18 taxes from the debtor during the pendency of the debtor's chapter
19 13 plan. The Ninth Circuit held that, under § 1327(b), because
20 the debtor had a confirmed chapter 13 plan that vested property
21 of the estate in the debtor-as opposed to the bankruptcy
22 estate-the taxing authority did not violate the automatic stay by
23 attempting to collect the taxes from the debtor. Id. at 928-29.

24
25 ³11 U.S.C. § 1327(b) states as follows:

26 (b) Except as otherwise provided in the plan or the
27 order confirming the plan, the confirmation of a plan
vests all of the property of the estate in the debtor.

1 In reaching its decision, the Ninth Circuit discussed various
2 interpretations by courts as to whether, and to what degree,
3 property of the estate reverts in a debtor upon plan confirmation
4 under § 1327(b); however, it declined to adopt a particular
5 approach. Id. at 928. Instead, the court concluded that it was
6 sufficient under the facts of the case to "hold that under the
7 plain language of § 1327(b), the property of the estate reverts
8 in the debtor upon plan confirmation, unless the debtor elects
9 otherwise in the plan." Id.

10 Although the Ninth Circuit did not find it necessary to
11 endorse a particular vesting rule under § 1327(b), the Ninth
12 Circuit Bankruptcy Appellate Panel (which the Ninth Circuit
13 affirmed) had adopted such a rule in its published opinion.
14 After reviewing four approaches under § 1327(b), the BAP adopted
15 the "estate termination approach" under which "all property of
16 the estate vests in the debtor at confirmation[,]" unless the
17 plan or confirmation order provides differently. Cal. Franchise
18 Tax Bd. v. Jones (In re Jones), 420 B.R. 506, 514 (9th Cir. BAP
19 2009) (citation omitted). In other words, according to the BAP,
20 the bankruptcy estate ceases to exist upon plan confirmation
21 except for property the plan or confirmation order clearly
22 reserves for the bankruptcy estate. Id. at 517. This court
23 agrees with that approach.

24 Under Jones, then, the question is whether by committing
25 \$160,000 in proceeds from a sale of the co-debtor's 50% interest
26 in the corporation to fund the third modified plan it was
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1 intended that the co-debtor's entire corporate interest would
2 remain property of the estate despite a provision in that plan
3 that property of the estate reverts in the debtors upon
4 confirmation. In answering this question, the court finds the
5 recent decision by Hon. Jim D. Pappas, United States Bankruptcy
6 Judge District of Idaho, in In re Thiel, 2015 WL 2398555 (Bankr.
7 D. Idaho 2015), extremely persuasive.

8 In Thiel, the trustee sought to sell the debtor's residence
9 under § 363(h) after the debtor's plan was confirmed. Id. at *1-
10 2. The trustee relied on Jones to argue that by committing
11 proceeds from the sale of the residence to fund the plan, the
12 residence did not revert in the debtor upon confirmation but,
13 instead, remained property of the estate that the trustee could
14 sell post-confirmation under § 363. Id. at *4. The court
15 rejected that argument. The court first explained that under
16 § 1327(b) the residence lost its status as property of the estate
17 upon confirmation of the debtor's plan. Id. It also noted that
18 the debtor's plan provided for the revesting of property of the
19 estate in the debtor and the plan provision that obligated the
20 debtor to fund the plan with proceeds from the sale of the
21 residence was not the type of specific provision that Jones
22 required in order to prevent property from reverting in the
23 debtor upon confirmation and to instead remain property of the
24 estate. Id. at *4-5.

25 In this case, the third modified plan states that property
26 of the estate shall revert in the debtors upon confirmation. And
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1 although the "additional provision" in that plan obligates the
2 co-debtor to turn over no less than \$160,000 to fund the plan
3 upon the sale of her interest in the corporation, this court
4 agrees with Thiel and concludes that language is insufficient to
5 utilize the "except as otherwise provided" provision of
6 § 1327(b). Thiel, 2015 WL 2398555 at *5 (citing Jones, 420 B.R.
7 at 516-17 ("If a debtor seeks to postpone revesting of all or
8 some of the property of the estate, the plan or order of
9 confirmation should clearly say so. Saying so is easy to do."
10 (Quotation omitted)))." That means that upon confirmation of the
11 third modified plan the estate ceased to exist, the co-debtor's
12 50% corporate interest revested in the co-debtor, and the co-
13 debtor's corporate interest lost its status as property of the
14 estate. No longer property of the estate, the co-debtor's 50%
15 interest in the corporation could not be sold under § 363 which
16 applies only to sales of property of the estate.

17 In sum, by confirming a chapter 13 plan that revests
18 property of the estate in the debtors, and does not specifically
19 reserve the co-debtor's 50% interest in the corporation as
20 property of the estate upon confirmation, the sale required by
21 the terms of the third modified plan and the valuation and
22 transfer motion are governed by CCC § 2000 because § 363 is no
23 longer applicable to the mandatory sale of the co-debtor's
24 corporate interest post-petition.

25 One final point of clarification. Because the court has now
26 determined that CCC § 2000 applies to the valuation and transfer
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1 motion and governs the sale and transfer of the co-debtor's 50%
2 interest in the corporation, the court touches briefly on the
3 constitutional objections to CCC § 2000 and the CCC § 2000
4 process the debtors raised in opposition to the valuation and
5 transfer motion. The court reaffirms its earlier ruling that it
6 need not reach those constitutional objections because of its
7 ability to resolve the valuation and transfer motion under the
8 Bankruptcy Code as it has done in this amended decision, albeit
9 under a different provision.⁴

10 In relevant part, § 1327(a) states that "the provisions of a
11 confirmed [chapter 13] plan bind the debtor[.]" Principles of
12 res judicata and finality, as partly codified in § 1327(a), can
13 make even illegal provisions of a chapter 13 plan binding.
14 County of Ventura Tax Collector v. Brawders (In re Brawders), 503
15 F.3d 856 (9th Cir. 2007); In the Matter of Gregory, 705 F.2d
16 1118, 1121 (9th Cir. 1983) (failure to raise objection to
17 legality of confirmation at hearing or to appeal from
18 confirmation order precludes later attack on plan or provision as
19 illegal). Moreover, the res judicata effect of a confirmed
20 chapter 13 plan is not necessarily limited to issues actually
21 known prior to the confirmation hearing but, rather, includes all

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23 ⁴Although the debtors question the constitutionality of a
24 state statute, they did not comply with Federal Rule of
25 Bankruptcy Procedure 9005.1 (incorporating Federal Rule of Civil
26 Procedure 5.1) which requires notice to the California Attorney
27 General and certification by the court under 28 U.S.C. § 2403.
Because the court is adjudicating the matter without reaching the
constitutional question, compliance with the Rule is not
required. See In re Clemente, 409 B.R. 288, 294 n.6 (Bankr. N.J.
2009).

1 issues that could have or should have been litigated at or before
2 the confirmation hearing. Trulis v. Barton, 107 F.3d 685, 691
3 (9th Cir. 1997); Duplessis v. Valenti (In re Valenti), 310 B.R.
4 138, 150 (9th Cir. BAP 2004).

5 Under § 1327(a), the third modified plan is res judicata as
6 to any issues the debtors could have raised-but failed to raise
7 -regarding the constitutionality of CCC § 2000. Certainly the
8 debtors knew well before the third modified plan was confirmed
9 that the co-debtor's 50% interest in the corporation would be
10 sold and proceeds from that sale used to fund the plan. The
11 debtors also knew as early as the stay relief proceedings, and
12 thus well before the third modified plan was confirmed, that the
13 CCC § 2000 process was to continue before this court. Yet, the
14 debtors made no mention of any constitutional objection to CCC
15 § 2000 prior to confirmation or when the third modified plan was
16 confirmed. The res judicata effect of the order confirming the
17 third modified plan now precludes those challenges under
18 § 1327(a).

19 Based on the foregoing, the court concludes that the post-
20 confirmation sale required by the "additional provision" of the
21 debtors' confirmed third modified plan and the valuation and
22 transfer motion are governed by CCC § 2000. Therefore, the court
23 vacates and amends its oral rulings of September 9, 2015, and its
24 order of September 11, 2015, and replaces both with this
25 memorandum decision. And based on this court's amended decision,
26 the court will enforce and implement the third modified plan in
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1 the following manner:

2 (1) The court will hold an evidentiary hearing on
3 Thursday, November 19, 2015, at 10:00 a.m. at which time it will
4 hear live testimony from the parties' joint appraisers and at or
5 after which it will confirm, or adjust if warranted, the "fair
6 value" stated in the *Joint Fair Valuation Report of Alan Statz*
7 *and John Toney* [dkt. 108, exhibit 1]. See Orange County Nursery,
8 439 B.R. 144, 152 (C.D. Cal. 2010) ("Whether the appropriate
9 valuation is the [\$ 2000] appraised value or some other value is
10 a matter for the Bankruptcy Court to determine in the first
11 instance.").

12 (2) The court will resolve the debtors' remaining
13 objections to the appraisal report reserved on September 9, 2015,
14 at or very shortly after the evidentiary hearing.

15 (3) The award of the joint appraisers determined
16 following the evidentiary hearing, as confirmed by this court,
17 shall then be final and conclusive upon all parties.

18 (4) The court will enter a decree which shall provide
19 in the alternative for winding up and dissolution of the
20 corporation unless payment is made for the co-debtor's shares
21 within the time specified by the decree.

22 (5) If the corporation, as the purchasing party,
23 desires to prevent the winding up and dissolution it shall pay to
24 the co-debtor or tender to the trustee the value of the co-
25 debtor's shares ascertained and decreed within the time
26 specified, or, in case of an appeal, as fixed on appeal. On
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1 receiving such payment or the tender thereof, the co-debtor shall
2 transfer her corporate shares to the corporation.

3 (6) If the corporation does not make payment for the
4 shares within the time specified in the court's decree, judgment
5 shall be entered against it and the surety or sureties on the
6 bond for the amount of the expenses (including attorneys' fees)
7 of the co-debtor.

8
9 B. The Corporation's Request for Extension to Remove the
10 CCC § 2000 Proceeding Pending in State Court is Denied
as Moot.

11 Based on the court's decision stated above, the
12 corporation's request under Federal Rule of Bankruptcy Procedure
13 9006(b)(1) to extend the time in 28 U.S.C. § 1452 and Federal
14 Rule of Bankruptcy Procedure 9027 to remove the CCC § 2000
15 proceeding pending in the Solano County Superior Court will be
16 denied as moot.

17
18 C. The Valuation and Transfer Motion is a Core Proceeding
19 or, if Non-Core, is a Proceeding that the Corporation
Consented to Have Determined by a Bankruptcy Judge.

20 The corporation requests a determination as to whether the
21 valuation and transfer motion is a core or non-core matter.
22 Confirmation of the chapter 13 plan was a core matter under 28
23 U.S.C. §§ 157(b)(2)(B), (L) and (O). The valuation and transfer
24 motion asks the court to interpret and implement the debtors'
25 confirmed third modified plan in general and the sale provisions
26 of that confirmed plan in particular. This court has core
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jurisdiction to do that. In re Lyondell Chem. Co., 445 B.R. 277, 287 (Bankr. S.D.N.Y. 2011) ("[A] bankruptcy court retains core jurisdiction to interpret and enforce its own prior orders, including and especially confirmation orders."); see also Travelers Indem. Co. v. Bailey, 557 U.S. 137, 151 (2009) ("[T]he Bankruptcy Court plainly ha[s] jurisdiction to interpret and enforce its own prior orders."); Williams v. Citifinancial Mortgage Co. (In re Williams), 256 B.R. 885, 892 (8th Cir. BAP 2001) ("the enforcement of orders resulting from core proceedings are themselves considered core proceedings"); In re Brown's Chicken & Pasta, Inc., 503 B.R. 86, 90 (Bankr. N.D. Ill. 2013) (bankruptcy court found to have authority to interpret its order confirming a plan to determine whether items in dispute were covered by a bankruptcy sale).

CONCLUSION

Upon consideration of the clarification motion and further consideration of the valuation and transfer motion;

IT IS ORDERED that the clarification motion is GRANTED IN PART AND DENIED IN PART as follows:

(i) GRANTED insofar as the court amends its prior decision and concludes the valuation and transfer motion and the sale of the co-debtor's 50% interest in the corporation required by the third modified plan are governed by CCC § 2000;

(ii) GRANTED to the extent the court determines the valuation and transfer motion to present a core matter; and

1 (iii) DENIED AS MOOT to the extent the corporation requests
2 an extension to remove the CCC § 2000 proceeding pending in the
3 Solano County Superior Court.

4 IT IS FURTHER ORDERED that the court's prior decision
5 granting in part and denying in part the valuation and transfer
6 motion is amended for the reasons stated herein and to reflect
7 that the valuation and transfer motion is GRANTED.

8 IT IS FURTHER ORDERED that the extension motion is DENIED AS
9 MOOT.

10 IT IS FURTHER ORDERED that the evidentiary hearing set for
11 October 22, 2015, at 10:00 a.m. is VACATED and RESET to Thursday,
12 November 19, 2015, at 10:00 a.m.

13 IT IS FINALLY ORDERED that all other rulings stated orally
14 on the record on September 9, 2015, and the order of September
15 11, 2015, remain unchanged except and unless amended herein.

16 Dated: October 20, 2015.

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19 UNITED STATES BANKRUPTCY JUDGE
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**INSTRUCTIONS TO CLERK OF COURT
SERVICE LIST**

The Clerk of Court is instructed to send the attached document, via the BNC, to the following parties:

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